Commonwealth of Kentucky
Supreme Court of Kentucky

2013 -SC-000620
(2011-CA-002294)
(2012-CA-000007)

JAMES OVERSTREET, ADMINISTRATOR of the ESTATE of LULA BELLE GORDON, deceased — APPELLANT

v.

KINDRED NURSING CENTERS LT. PARTNERSHIP d/b/a HARRODSBURG HEALTH CARE CENTER; KINDRED NURSING CENTERS, EAST, LLC; KINDRED HOSPITALS LIMITED PARTNERSHIP; KINDRED HEALTHCARE, INC.; KINDRED HEALTHCARE OPERATING, INC.; and KINDRED REHAB SERVICES, INC. d/b/a PEOPLE*FIRST* REHABILITAITON — APPELLEES

BRIEF OF APPELLANT

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NOTICE

Please take notice that this document will be filed in the Office of the Clerk of the Supreme Court of Kentucky on this, the 10th day of October, 2014.

CERTIFICATE OF SERVICE

I certify that this document was served upon Donald L. Miller, II, Esq., J. Peter Cassidy, III, Esq., and Kristin M. Lomond, Esq. of Quintairos, Prieto, Wood & Boyer, P.A., 9300 Shelbyville Road, Suite 400, Louisville, KY 40222; upon the Hon. Darren W. Peckler, Mercer Circuit Court, 224 S. Main St., Harrodsburg, Ky 40330; and upon the Hon. Sam Givens, Clerk of the Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601, on this the 10th day of October, 2014.

Robert E. [illegible]
Counsel for Appellant

INTRODUCTION

This appeal relates to an attempt by appellee Kindred Nursing Centers Limited Partnership et al., ("Appellees") to construe language from Kentucky's Long Term Care Facility Residents' Rights Statute, KRS § 216.515—that "[a]ny resident whose rights as specified in this section are deprived or infringed upon shall have a cause of action"—as signifying something other than the authorization of a cause of action under Kentucky statutory law. Lula Belle Gordon, the mother of appellee James Overstreet ("Appellant"), was a long term nursing home care resident at appellee Kindred Nursing Centers Limited Partnership d/b/a Harrodsburg Health Care Center, from March 2002 to May 2008. Appellant sued Appellees in Mercer County on behalf of his mother's estate for violations of Mrs. Gordon's rights specified under KRS § 216.515.

Appellees and other co-defendants filed a counterclaim for a declaration of rights under the Statute of Limitations as applied to KRS § 216.515, and thereafter moved to dismiss Appellant's action on the grounds that the Statute of Limitations had run, that Appellant lacked standing to bring the claims, that the claims violated the Doctrine of *Laches*, and that the corporate defendants were not liable on the claims as a matter of law. The Circuit Court granted the motion to the extent of this last aforementioned basis, dismissing the other corporate defendants, and denied it as to all the rest. The Court of Appeals reversed the Circuit Court regarding the Statute of Limitations, opining that "we cannot conclude that KRS 216.515 creates any new statutory theory of liability; rather, KRS 216.515 merely sets forth various standards of care created by legislative enactment." Appellant has appealed this Opinion to this honourable Court.

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SUMMARY OF ARGUMENT

There are three questions presented in this appeal:

(1) What is the Statute of Limitations appertaining to KRS § 216.515?

(2) Does Appellant's Complaint make out a KRS § 216.515 claim?

(3) Can an owning and operating corporation for a long term care facility itself be liable for violations of KRS § 216.515?

Where a statute merely modifies or replaces a standard of care, the Common Law cause of action appertaining thereto sets the Statute of Limitations via KRS § 413.140. On the other hand, where a statute creates new rights, along with a new cause of action, the Statute of Limitations for such a cause of action is set by KRS § 413.120. Appellant believes that Appellees will concur with this analysis.

The disagreement arises as to whether KRS § 216.515 falls in the former or latter category. KRS § 216.515 falls in the latter category because the statute says so, in no uncertain terms. As an illuminating aside, a survey of other State laws on the subject matter indicate that residents' rights statutes are not considered mere modification to a standard of care going to a preexisting Common Law action; rather such statutes constitute new, independent causes of action. Furthermore, KRS § 413.120 specifically provides for a specific Statute of Limitations for "rights" created via statute, and KRS § 216.515 does create such "rights," by its black letter. The Court of Appeals here, holding that KRS § 216.515 does nothing more than set a standard of care for a Common Law cause-of-action, is in error and should be reversed.

Additionally, where the Statute of Limitations going to a perfected allegation in a Complaint has not yet run, such a claim must go forward, whether or not other allegations

should be dismissed as untimely (or facts, struck out as irrelevant). Surplusage in a perfected allegation can be dismissed or disregarded, even as other perfected allegations go forward. Whatever may be considered unnecessary allegations in Appellant's Complaint, he has made out a residents' rights action and should be permitted to go forward with this particular claim.

Finally, where a long term care facility is not a stand-alone entity, but is owned and operated in a holistic business venture of providing nursing home care, that venture may be held liable for violations of KRS § 216.515. Whether a facility is stand-alone, or is merely one operational cog in a conglomerate machine, is a matter of proof. Appellant's claim against the nursing home conglomerate should be reinstated, and made subject only to the requirement that Plaintiff provide evidence of the hand-in-glove relationship.

STATEMENT CONCERNING ORAL ARGUMENT

Appellant states that oral argument would be appropriate in this case inasmuch as this is a question of first impression in this Court, in interpreting the Kentucky statute in issue, and hereby requests such argument.

STATEMENT OF THE CASE

Appellant commenced an action on August 12, 2011, with the filing of his Complaint against Appellees alleging a sole cause-of-action on behalf of the estate of his late mother Lula Belle Gordon, a cause-of-action facially sounding in the violation of Mrs. Gordon's long term care facility residents' rights, KRS § 216.515. (Record on Appeal at pp. 1-12) Appellant's claims against Appellees arose out of the treatment his

mother Lula Belle Gordon endured while she was a resident at Harrodsburg Healthcare Center ("Center"), the brick and mortar nursing home constituting Appellees' nursing home facility. Excepting periods of necessary hospitalization, Mrs. Gordon was a resident at the Center from March 5, 2002 to May 17, 2008, the day she died.

The overarching matter in this appeal in this case stems from Appellees' motion to dismiss Appellant's Complaint. This Complaint had been premised solely upon alleged violations of KRS § 216.515, Kentucky's Long Term Care Facility Residents' Rights statute. (RA at pp. 86-97; pp. 114-134) Appellees made a motion to dismiss Appellant's Complaint (a motion effectively stemming from Appellees' counterclaims in the pleadings) in the trial court on a number of legal grounds.[1] Being a motion to dismiss made pursuant to CR 12.02(f), the *gravamen* of this appeal then is entirely a matter of law.

The trial court granted Appellees' motion in part, and denied it in part. On the one hand, the trial court denied (1) that the Statute of Limitations had run on the action; (2) that Appellant lacked standing to prosecute the KRS § 216.515 action; and (3) that Appellant had impermissibly delayed in filing the action (*laches*). On the other hand, the trial court granted Appellees' motion to dismiss the corporate defendants from the case, concluding that, as a matter of law, the corporate defendants could not be found liable under KRS § 216.515. Both sides appealed.

The Court of Appeals took up the case, held oral argument, and rendered its decision on August 9, 2013. That court reversed the trial court, holding that the Statute of Limitations had indeed run on the action, accepting therefore Appellees' construction

[1] Although the Doctrine of *Laches* is an equitable doctrine necessarily premised upon facts, the only facts upon which Appellees relied to make a *laches* argument were those self-evident from the pleadings.

of KRS § 216.515. As such, the Court of Appeals did not reach the question of whether or not the corporate defendants could be found liable under KRS § 216.515, nor did the Court of Appeals reach the question of standing or *laches*.

Appellees' successful argument in the Court of Appeals, was this: KRS § 216.515 does not engender statutory rights and a statutory cause of action; rather, this statute exists merely as a codification of a Common Law personal injury action—entitled therefore to only a one year Statute of Limitations pursuant to KRS § 413.140(1).[2]

> [W]e cannot conclude that KRS 216.515 creates any new statutory theory of liability; rather, KRS 216.515 merely sets forth various standards of care created by legislative enactment. The underlying common law personal injury claims remain undisturbed, and were merely reiterated by the legislature in KRS Chapter 216.
>
> Because KRS Chapter 216 does not create a new theory of liability, the one or two-year statutory periods for personal injury actions are applicable. Overstreet's action was not filed within two years of Mrs. Gordon's death, and is therefore time-barred.

(*Overstreet* Order at p. 9 (Appendix 1)) The Court of Appeals was persuaded by an earlier Court of Appeals case, that of *Allen v. Extendicare Homes, Inc.*, 2012 WL 6553823 (Ky.App.) (*unpublished*), which had opined:

> [W]e do not believe that KRS 216.515 creates any new statutory theory of liability; rather, we are of the opinion that KRS 216.515 merely sets forth sundry standards of care created by legislative fiat. Essentially, appellant's claims are based upon appellees' negligence with "the standard of care... legislatively declared by statute." Under either the one-year limitation period as set forth in KRS 413.140(1)(a) or under KRS 413.180, we conclude that appellant's claims were clearly time-barred.

Allen at p. 8 (citations omitted).

(*Id.* at p. 8)

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[2] Extended by KRS § 413.180 in applicable circumstances (which were present here and not at issue) to two years.

In addition to this "facial" argument regarding KRS § 216.515, Appellees also argued two other issues now on appeal: Appellees argued that, even if KRS § 216.515 did engender statutory rights and a statutory cause of action entitled to a five year Statute of Limitations pursuant to KRS § 413.120, Appellant's Complaint was mislabeled as a KRS § 216.515 action. Appellees contended that Appellant's Complaint makes out solely a Common Law personal injury claim. Appellees also argued that pursuant to the language of KRS § 216.515, only the Center itself could be liable for violations of residents' rights.

Appellant's Complaint itself provided, in part:

> 14. Nursing Home Defendants controlled the operation, planning, management, budget and quality control of Harrodsburg Health Care Center. The authority exercised by Defendants over the nursing facility included, but was not limited to, control of marketing, human resources management, training, staffing, creation and implementation of all policy and procedure manuals used by nursing facilities in Kentucky, federal and state reimbursement, quality care assessment and compliance, licensure and certification, legal services, and financial, tax and accounting control through fiscal policies established by Defendants.

(RA at p. 7)

> 26. The violations of the resident's rights of Lula Belle Gordon include, but are not limited to, the following:
>
> a) Violation of the right to be treated with consideration, respect, and full recognition of her dignity and individuality;
>
> b) Violation of the right to be suitably dressed at all times and given assistance when needed in maintaining body hygiene and good grooming;
>
> c) Violation of the right to have a responsible party or family member or her guardian notified immediately of any accident, sudden illness, disease, unexplained absence, or anything unusual involving the resident;

d) Violation of the right to have an adequate and appropriate resident care plan developed, implemented and updated to meet her needs;

e) Violation of the right to be free from abuse and neglect; and

f) Violation of the statutory standards and requirements governing licensing and operation of long-term care facilities as set forth by the Cabinet for Health and Family Services, pursuant to provisions of K.R.S. Chapter 216 and the regulations promulgated thereunder, as well as the applicable federal laws and regulations governing the certification of long-term care facilities under Titles XVIII or XIX of the Social Security Act.

27. As a result of the aforementioned violations of the Resident's Rights Statutes by Defendants, pursuant to K.R.S. § 216.515(26), Plaintiff is entitled to recover actual damages in an amount to be determined by the jury, but in excess of the minimum jurisdictional limits of this Court and exceeding that required for federal court jurisdiction in diversity of citizenship cases, as well as costs and attorney's fees.

(RA at p. 11)

KRS § 216.515 provides a series of rights in twenty-five subsections and we quoted verbatim in paragraph 26 of the Complaint. Then in a final subsection, the statute provides (emphasis added):

(26) Any resident whose ***rights as specified in this section*** are deprived or infringed upon ***shall have a cause of action*** against ***any facility responsible for the violation***. The action may be brought by the resident or his guardian. The action may be brought in any court of competent jurisdiction to enforce such rights and to recover actual and punitive damages for any deprivation or infringement on the rights of a resident. ***Any plaintiff who prevails in such action against the facility may be entitled to recover reasonable attorney's fees, costs of the action, and damages***, unless the court finds the plaintiff has acted in bad faith, with malicious purpose, or that there was a complete absence of justifiable issue of either law or fact. Prevailing defendants may be entitled to recover reasonable attorney's fees. ***The remedies provided in this section are in addition to and cumulative with other legal and administrative remedies available to a resident and to the cabinet.***

No Statute of Limitations time period is provided in KRS § 216.515.

KRS § 413.120 provides, in part (emphasis added):

> The following actions shall be commenced within ***five (5) years*** after the cause of action accrued:
>
> * * *
>
> (2) An action upon ***a liability created by statute***, when no other time is fixed by the statute creating the liability.
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> * * *
>
> (7) An action for an injury to the ***rights*** of the plaintiff, not arising on contract and not otherwise enumerated.

Any further facts necessary for the disposition of this appeal are recounted in the argument *infra*.

ARGUMENT

The standard of review here is *de novo*. It is always *de novo* review as to questions of law. *Fox v. Grayson*, 317 SW3d 1 (Ky. 2010). "Since a motion to dismiss for failure to state a claim upon which relief may be granted is a pure question of law, a reviewing court owes no deference to a trial court's determination; instead, an appellate court reviews the issue de novo." *Id.* Examining a motion to dismiss, the lower court should have construed "any reasonable inference in favor of the plaintiff and accept as true all material allegations in the complaint." *Berthelsen v. Kane*, 759 S.W.2d 831, 832 (Ky. App. 1988). The trial court's order was one predicated entirely upon the pleadings.

Kentucky law is clear. Statutorily-created rights with a statutorily-created cause of action are governed by KRS § 413.120(2) providing a five year limitation, if no other limitation has been written into the engendering statute. This case involves primarily

statutory interpretation, both the words of statutes and their apparent meanings. The Kentucky Supreme Court has set out guidelines for such interpretation:

> ***In construing statutes, our goal, of course, is to give effect to the intent of the General Assembly***. We derive that intent, if at all possible, from the language the General Assembly chose, either as defined by the General Assembly or as generally understood in the context of the matter under consideration. *Osborne v. Commonwealth*, 185 S.W.3d 645 (Ky.2006). ***We presume that the General Assembly intended for the statute to be construed as a whole, for all of its parts to have meaning, and for it to harmonize with related statutes***. *Hall v. Hospitality Resources, Inc.*, 276 S.W.3d 775 (Ky.2008); *Lewis v. Jackson Energy Cooperative Corporation*, 189 S.W.3d 87 (Ky.2005). ***We also presume that the General Assembly did not intend an absurd statute or an unconstitutional one***. *Layne v. Newberg*, 841 S.W.2d 181 (Ky.1992). Only if the statute is ambiguous or otherwise frustrates a plain reading, do we resort to extrinsic aids such as the statute's legislative history; the canons of construction; or, especially in the case of model or uniform statutes, interpretations by other courts. *MPM Financial Group, Inc. v. Morton*, 289 S.W.3d 193 (Ky.2009); *Knotts v. Zurich*, 197 S.W.3d 512 (Ky.2006); *Stephenson v. Woodward*, 182 S.W.3d 162 (Ky.2005).

Shawnee Telecom Resources, Inc. v. Brown, 454 SW3d 542, 551 (Ky. 2011) (emphasis added).

The General Assembly, having written no Statute of Limitations into KRS § 216.515, was apparently satisfied for KRS § 413.120(2) to apply. Even if this were not the case, KRS § 413.120(7) is written as a Statute of Limitations for rights' violations. KRS § 216.515 screams out that it is a rights' statute. To ignore subsection 7 would in this instance would be to repeal it.

I. The Statute of Limitations applicable to KRS § 216.515 is five years pursuant to KRS § 413.120(2) or KRS § 413.120(7), rather than one year pursuant to KRS § 413.140(1).

Appellant filed a cause of action to vindicate rights owed to his late mother. The rights sought to be vindicated were established by the General Assembly in KRS §

216.515, and the General Assembly created a cause of action in that same statute. The General Assembly did not however specify a Statute of Limitations for this Residents' Rights Statute. Thus the five (5) year Statute of Limitations applies from KRS § 413.120(2). The Kentucky Supreme Court has made this application clear, in cases involving ***injuries to the person***, as well as to claims vis-à-vis property:

> This Court has many times held that rights created by statute were governed by the five-year statute of limitations in KRS 413.120(2). *See Whittaker v. Brock*, Ky., 80 S.W.3d 428 (2002) (holding that KRS 413.120(2) is applicable to an action to enforce an award of workers compensation benefits); *Ammerman v. Board of Education of Nicholas County*, Ky., 30 S.W.3d 793 (2000) (holding that a civil rights claim for sexual discrimination was barred by KRS 413.120(2)); *Kentucky Commission on Human Rights v. Owensboro*, Ky., 750 S.W.2d 422, 423 (1988) (holding that "[t]he rights of the movants were created by KRS 344.230" and that "[t]herefore, since these rights are created by a statute which provides no limitation of its own, the 5–year statute of limitations found in KRS 413.120(2) should be applied."). *Pike v. Harold (Chubby) Baird Gate Co.*, Ky.App., 705 S.W.2d 947 (1986), held that KRS 413.120(2) governed a claim for wrongful discharge against an employer. The court said, "[t]he essence of the tort alleged ... is an interference with a right, in this case a statutory right, not a bodily injury. Thus the statute of limitations appropriate to this action is KRS 413.120(2), the five-year statute of limitations for actions upon a 'liability created by statute ...." ' Id. at 948. Furthermore, KRS 413.010, governing the recovery of real property, has historically applied to common law claims of adverse possession. *See Columbia Gas Transmission Corp. v. Consol of Kentucky, Inc.*, Ky., 15 S.W.3d 727 (2000); *Great Western Land Management v. Slusher*, Ky., 939 S.W.2d 865 (1996); and *Appalachian Regional Healthcare, Inc. v. Royal Crown Bottling Co.*, Ky., 824 S.W.2d 878 (1992). In the cases *sub judice*, the landowners' rights to repurchase their property and the Cabinet's obligation to offer any surplus property back to the condemnees after eight years, were both created solely pursuant to statute. Therefore, we conclude that the five-year statute of limitations contained in KRS 413.120(2) governs claims arising pursuant to KRS 416.670.

Vandertoll v. Commonwealth, 110 SW3d 789, 795 (Ky. 2003).

KRS § 216.515 is entitled "***Rights of residents*** – Duties of facilities – Actions" (emphasis added). Thus if KRS § 216.515's subsections do not fall under KRS § 413.120(2), the only reasonable alternative would be that they fall under the Statute of Limitations of KRS § 413.120(7) (five years).

Kentucky law recognizes bodily injuries to the person as distinct from injuries to the rights of the person, mandating different considerations as to the appropriate Statute of Limitations. In the case of *Resthaven Memorial Cemetery v. Volk*, 150 SW2d 908 (Ky. 1941) (construing the immediate predecessors of the current statutory scheme, §§ 2515 and 2516 of the Kentucky Statutes),[3] the Court recognized a clear distinction in Kentucky law between infringing upon a person's rights and causing him bodily injury, and that this distinction applied to questions of the appropriate limitations. In *Resthaven*, the plaintiff's deceased wife had been disinterred from her grave and moved by a cemetery company without the plaintiff's knowledge or consent. The plaintiff sued over a year after the fact, and the defendant interposed the Statute of Limitations, arguing that the allegation constituted an injury to the person (ostensibly one year), as opposed to an injury to property (ostensibly five years, the *Resthaven* plaintiff's position). The *Resthaven* Court concluded that the injury was one "to the person," but not included under the one year limitation. Rather, the injury was one to rights more generally. Quoting *Western Union Telegraph Co. v. Witt*, 110 S.W. 889, 891 (Ky. 1908), the *Resthaven* Court said "an injury to the person in the meaning of section 2516... contemplates ***a physical injury*** to the person," referring to the shorter one year Statute of Limitations. *Resthaven*, 150 SW2d at 911 (emphasis added).

[3] KS § 2516 was the predecessor of KRS § 413.140(1)(a), and KS § 2515 was the predecessor of KRS § 413.120(7).

Resthaven then added this further illuminating discussion, distinguishing the person's right to be free of physical injury from the other rights of the person:

> The word "rights" as used in section 2515 is a much broader term than the word "person" as used in section 2516. The former would include an injury to any right, property, physical or bodily injury, or injury to the sensibilities, that is, mental anguish and the like. ***It would appear, therefore, that the word "person" appearing in section 2516 was used advisedly and with the view of taking from the broad meaning of the word "rights" appearing in section 2515, bodily or physical injuries and placing such actions within the one-year statute.*** It is obvious, therefore, that since all the actions enumerated in section 2516 were previously covered by section 2515, the only purpose of the former was to take certain actions from the category of the latter which were included in the broad phrase "***an action for the injury to the rights of the plaintiff.***" We conclude, therefore, that plaintiff's cause of action comes within the ***five-year statute of limitations*** as provided in section 2515.

Id.

If KRS § 216.515 is a codification of a pre-existing Common Law tort, it must be a "rights" tort, thereby necessitating application of KRS § 413.120(7) and a five year Statute of Limitations. As noted in the *Vandertoll* quote *supra*, other cases confirm that not all injuries to the person are physical—some go to the rights of the person—and are not controlled by KRS § 413.140(1)(a). In *Pike v. Harold (Chubby) Baird Gate Co.*, this Court held that KRS § 342.197, prohibiting harassing, coercing, discharging, or discriminating against an employee for filing of workers' compensation claim, engendered a cause of action for wrongful discharge under a five year Statute of Limitations as a "liability created by statute". *Pike v. Harold (Chubby) Baird Gate Co., Inc.*, 705 SW2d 947, 948 (Ky.App. 1986). In *Gray v. International Association of Heat and Frost Insulators and Asbestos Workers,* the federal court of appeals, interpreting Kentucky law, held that since Kentucky's Labor Management Relations Act provided no

period of limitations for breach of duty of fair representation, such an action would be under a five year period as a liability created by statute. *Gray v. International Association of Heat and Frost Insulators and Asbestos Workers, Local No. 51*, 416 F2d 313, 316-317 (6th Cir. 1969).

In their quintessence, the alleged harms to Appellant's mother were injuries to rights created and recognized by statute. KRS § 413.120 thus applies. *See e.g.*, *Kentucky Commission on Human Rights v. City of Owensboro*, 750 SW2d 422 (Ky. 1988) (violation of civil rights would be under KRS § 413.120(2), not KRS § 413.140(1)(e)).

Indeed, Kentucky's long term care facility residents' rights statutory scheme signals an intent to establish protection for a unique relationship in society—that between a nursing facility and its sick, often elderly, residents. "Residents' rights in nursing homes in Kentucky took a giant leap forward as a consequence of the enactment of the Nursing Home Residents' Bill of Rights." Adrienne Noble Nacev and Jeremy Rettig, *A Survey of Key Issues in Kentucky Elder Law*, 29 N.KY.L.REV. 139, 184(2002). For instance, nursing home involuntary discharges are limited. For protection of the residents, employment is limited. *See* KRS §§ 216.532, 216.533. Posting of the Residents' Bill of Rights throughout the facility is mandated. *See* KRS § 216.520. Visitation is mandated. *See* KRS § 216.537 Access of Cabinet inspectors is compelled. *See* KRS § 216.540. The list could go on. Establishing such a unique relationship is the obvious intent of the General Assembly's legislation, and implicitly mandates that the Statute of Limitations for injuries committed in the nursing home setting be unique as well.

Appellees may be tempted to analogize residents' rights to civil rights, and to cite to *Million v. Raymer*, 139 SW3d 914 (Ky. 2004), for the proposition that civil rights actions are characterized as personal injury actions for purposes of the Statute of Limitations. This analogy would be incorrect however. *Million v. Raymer* involved a federal civil rights-premised action (42 USC § 1983 (violation of civil rights by government officials, operating under colour State law)) prosecuted in State court, and brought by a State-incarcerated inmate. The U.S. Supreme Court has affirmatively mandated that such federal civil rights actions are to be governed by the State Statute of Limitations law regarding personal injury actions. *See Wilson v. Garcia*, 471 US 261 (1985). However, 42 USC § 1983, unlike KRS § 216.515, does not engender new rights; rather, it merely creates a cause of action for deprivation of those rights under colour of State law.

> Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of ***any rights, privileges, or immunities secured by the Constitution and laws***, shall be liable to the party injured in an action at law....

42 USC § 1983 (emphasis added).[4] This statute thus creates no new rights.

The unpublished case cited in the Opinion at bar, *Allen v. Extendicare Homes, Inc.*, 2012 WL 6553823, sought to draw a parallel to KRS § 216.515 with the case of *Toche v. American Watercraft*, 176 SW3d 694, 698 (Ky.App. 2005), for the proposition

[4] Finally, it should be as a pertinent aside that today KRS § 413.140(k) affirmatively establishes a one year Statute of Limitations for "an action arising out of a detention facility disciplinary proceeding, whether based upon state or federal law."

"that we do not believe that KRS 216.515 creates any new statutory theory of liability." Rather it "merely sets forth sundry standards of care created by legislative fiat."

However, the statute in *Toche* is KRS § 235.300, quite a different statute from KRS § 216.515. The former statute provides (emphasis added):

> The operator of a vessel or motorboat shall be liable for any injury or damage occasioned by the negligent operation of such vessel or motorboat, ***whether such negligence consists of a violation of the provisions of the statutes of this state*** or ***neglecting to observe such ordinary care and operation as the rules of the common law require***.... Nothing contained herein shall be construed to relieve any other person from any liability which he would otherwise have, ***but nothing contained herein shall be construed to authorize or permit any recovery in excess of injury or damage actually incurred.***

A cursory comparison of the two statutes in question reveals that they are not analogues. KRS § 216.515 describes rights, which are made enforceable in civil law through the pursuit of legal damages for their violation. It even states that it is creating rights in the statute, and it is somewhat inexplicable that the Court of Appeals did not address this language in their *Allen* and *Overstreet* Opinions. It is difficult to comprehend how "***shall have a cause of action***" does not signal an original creation of a legal cause of action.

The *Toche* statute, in contrast, describes only ***how*** Common Law rights may be violated, and thus become actionable. That is, it modifies a standard of care. KRS § 235.300 in essence adds the nautical rules of the road enacted by the Commonwealth to the Common Law standard of ordinary care as the demonstration of negligence for a personal injury action: "[W]hether such negligence consists of a violation of the provisions of the statutes of this state ***or*** neglecting to observe such ordinary care and operation as the rules of the common law require." Thus, the *Toche* statute simply

modified the standards of care for personal injury in a particular environment. In contrast, KRS § 216.515 is an entirely new animal. If KRS § 216.515 indeed signals the legislative intent to merely set forth "sundry standards of care"—as opposed to signalling the legislative intent to "create[...] [a] new statutory theory of liability"—the *Allen* Court's unpublished decision does not aid much in illuminating how this can be.

The difference between KRS § 216.515 and statutes which only alter the standards to meet the Common Law duty of care are readily demonstrable. For instance, regarding another case cited by Appellees below, in *Adkins v. Johnston*, 2006 WL 3759549 (Ky.App.), given that the Common Law already confirmed that persons have the right not to be bitten by another's dog, the statute in that case merely changed the standard of care required of dog owners to make out a breach of this right. KRS § 258.275(1) supplanted the Common Law's "One Free Bite" rule.

None of the cases cited by Appellees below involved the creation of a right, and the commensurate engendering of a legal duty. In *Stivers v. Ellington*, 140 S.W.3d 599 (Ky.App.2004), a snowboarder who sustained injuries could not bring a negligence action under Colorado Ski Safety Act, with a different Statute of Limitations, because the Colorado statute did not create any new liability. In *Robinson v. Hardaway*, 169 S.W.2d 823 (Ky.App.1943), the plaintiff injured in an automobile accident could not invoke a different Statute of Limitations under a statute which merely created a conduit for liability to the auto accident's defendant-father, who signed his son's application for a driver's license. ***No Kentucky case exists where brand new, separate rights and duties have been created by statute, only to be made subject to a Common Law derived Statute of Limitations.***

Most, if not all, of the rights listed in KRS § 216.515 simply did not exist prior to the statute's enactment, and thus the cause of action for deprivation thereof could not have existed prior to the statute's enactment. For instance, KRS § 216.515 provides in part (emphasis added):

> Every resident in a long-term-care facility shall have at least the following rights:
>
> (1) Before admission to a long-term-care facility, the resident and the responsible party or his responsible family member or his guardian ***shall be fully informed in writing***, as evidenced by the resident's written acknowledgment and that of the responsible party or his responsible family member or his guardian, ***of all services available at the long-term-care facility***. Every long-term-care facility shall keep the original document of each written acknowledgment in the resident's personal file.
>
> * * *
>
> (3) The resident and the responsible party or his responsible family member or his guardian shall be fully informed in writing, as evidenced by the resident's written acknowledgment and that of the responsible party or his responsible family member, or his guardian, prior to or at the time of admission and quarterly during the resident's stay at the facility, ***of all service charges for which the resident or his responsible family member or his guardian is responsible for paying***. The resident and the responsible party or his responsible family member or his guardian shall have the right to file complaints concerning charges which they deem unjustified to appropriate local and state consumer protection agencies. Every long-term-care facility shall keep the original document of each written acknowledgment in the resident's personal file.
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> * * *
>
> (12) Residents may ***retain the use of their personal clothing*** unless it would infringe upon the rights of others.
>
> * * *
>
> (20) Residents ***have the right to be suitably dressed at all times and given assistance when needed in maintaining body hygiene and good grooming***.
>
> * * *

(22) The ***resident's responsible party or family member or his guardian shall be notified immediately of any accident, sudden illness, disease, unexplained absence, or anything unusual*** involving the resident.

* * *

(24) Each resident and the responsible party or his responsible family member or his guardian ***has the right to have access to all inspection reports*** on the facility.

* * * *

This is a non-exhaustive list. There was no Common Law cause-of-action for preventing a nursing home resident from wearing his "personal clothing unless it would infringe upon the rights of others." KRS § 216.515(12). There is no Common Law cause-of-action for failing to inform a resident in writing "of all services available at the long-term-care facility." KRS § 216.515(1). Prior to statutory enactment, no such cause-of-action existed. Afterward, such a cause-of-action does exist. Ergo, the General Assembly has created a new statutory cause-of-action subject to the Statute of Limitations from KRS § 413.120. The alternative, as advanced by Appellees and the lower court, that the rights listed by KRS § 216.515 constitute a codification of a standard of care for personal injury, wrongful death, or some sort of medical malpractice, is nonsensical. Can it really be proposed that violating a resident's right to be suitably dressed could be a material element in a wrongful death or malpractice claim?

A straight-forward reading of KRS § 216.515 demonstrates a new statutory rights cause-of-action subject to the Statute of Limitations from KRS § 413.120. In addition to the "rights" and "shall have a cause of action" verbiage in the statute, the fact that the statute provides for ***attorneys fees*** helps confirm that the statute creates rights, rather than acts merely to adjust the Common Law standard of care for personal injury. Such rights,

e.g., the right to assistance in grooming and bodily hygiene, did not exist at Common Law. KRS § 216.515 is ***not*** a codification of a pre-existing Common Law personal injury, wrongful death, or medical malpractice cause of action, and the lower court's Opinion must be reversed as to the applicable Statute of Limitations to Appellant's action.

As a final aside on this issue, although not an argument relied upon by the Court of Appeals, Appellees also argued below that, if Appellant's claims make out violations of KRS § 216.515 (*see argument infra*), and if KRS § 216.515 engenders statutory rights falling under a Statute of Limitations different from that for medical malpractice; then this Statute of Limitations result renders the statute unconstitutional special legislation, *i.e.*, an unjustifiable discrimination against nursing homes. Interestingly, Appellees did not challenge the constitutionality of KRS § 216.515 generally, even though this statute is obviously aimed at elevating protections for a class of persons in need of that protection. Which is apparently an acceptable practice. *See e.g., Roach v. Commonwealth*, 313 SW3d 101(Ky. 2010) (prosecution for violation of elder abuse statute).

Residents of long term care facilities are a unique, readily identifiable, and obviously vulnerable class of citizens, for which the General Assembly could reasonably and constitutionally legislate additional safeguards. It should go to the discretion of the General Assembly as to whether the assembly considers long term care facility residents in a different class, entitled to a different Statute of Limitations. Kentucky courts will defer to the General Assembly in determining in good faith the manner of protection for vulnerable individuals or entities. *See Temperance League of Kentucky v. Perry*, 74, SW3d 730, 733-734 (Ky. 2002) (General Assembly decision to permit voting on

restaurant sales of alcohol in otherwise dry counties a Constitutionally permissible exercise of discretion to promote reasonable purpose of economic growth).

For all the reasons argued in this section, this Court should reverse the Court of Appeals.

II. A comparison with other jurisdictions and statutory schemes indicates that KRS § 216.515 should be seen to create statutory rights.

The statute here is unambiguous. It sets out rights unknown at Common Law—rights that the General Assembly very appropriately engendered and recognized, given the vulnerability of long term care facility residents to suffer indignity and indifference. It sets out, in black letter, a cause of action for the vindication of such rights.

Legislative history here is practically absent for KRS § 216.515. However, although the Kentucky statutes are not part of a uniform code shared with sister States, it is illuminating to consider other jurisdictions' analogous statutory schemes for protecting long term care facility residents' rights, to determine when statutory rights and causes of action are created, and when they are not. Appellant points to this other State law solely for the proposition that residents' rights statutes are generally considered to stand up independent statutory causes of action, and ***not*** merely to adjust Common Law standards of care.

Some State legislatures have erected statutory protections for their vulnerable citizenry in long term care facilities, clearly mandating that these protections are in addition to Common Law remedies for other violations and thus not mere codification of standards of care. In Arkansas, a Long-Term Care Resident's Rights claim, ARK. CODE ANN. § 20-10-1209, is a statutory claim separate from the Common Law claim of

ordinary negligence. *Koch v. Northport Health Services of Arkansas, LLC*, 205 S.W.3d 754, 762. In West Virginia, the legislature provides that "[t]he penalties and remedies provided in this section [establishing rights and duties at assisted living residences] are cumulative and shall be ***in addition*** to all other penalties and remedies provided by law." W.VA.CODE § 16-5D-15(g) (emphasis added).

Wisconsin provides that "[a]ny person residing in a nursing home has an ***independent cause of action*** to correct conditions in the nursing home or acts or omissions by the nursing home or by the department, that the (1) [t]he person alleges violate this subchapter or rules promulgated under this subchapter; and (2) [t]he person alleges are foreseeably related to impairing the person's health, safety, personal care, rights or welfare." WIS. STAT. ANN. § 50.10 (emphasis added). "The remedies provided by this subchapter are ***cumulative*** and shall not be construed as restricting any remedy, provisional or otherwise, provided by law for the benefit of any party, and no judgment under this subchapter shall preclude any party from obtaining additional relief based upon the same facts." WIS. STAT. ANN. § 50.11 (emphasis added).

The New York statutes are no less clear: "The remedies provided in this section [providing for private actions by patients of residential health care facilities] are ***in addition to and cumulative*** with any other remedies available to a patient, at law or in equity or by administrative proceedings, including tort causes of action, and may be granted regardless of whether such other remedies are available or are sought." N.Y. Health Law § 2801-d.4 (McKinney) (emphasis added).

Georgia provides that "[n]othing in this Code section [establishing rights and duties at assisted living residences] shall be construed to preempt any other law or to

deny to any individual any rights or remedies which are provided by or under any other law." GA. CODE ANN. § 31-8-126(f). The courts in Georgia have affirmatively recognized that a violation of Georgia's Long-Term Care Bill of Rights is ***a statutorily-created tort separate from those torts constituting malpractice***. *Thurman v. Pruitt Corp.*, 442 S.E.2d 849, 851 (Ga.App. 1994); *see also Brogdon ex rel. Cline v. National Healthcare Corp.*, 103 FSupp2d 1322, 1333 (NDGa 2000) (recognizing separate cause of action for violation of Georgia's Long-Term Care Facilities statute).

The Florida courts are likewise clear that even the same set of facts may support a violation of Florida's statutory nursing home residents' rights ***as well as*** medical negligence. *See St. Angelo v. Healthcare and Retirement Corp. of America*, 824 So.2d 997, 998 (Fla.App.4Dist. 2002) ("The sole issue presented in this appeal is whether, as a matter of law, a single fall in a nursing home can constitute a violation under chapter 400, Florida Statutes."). Section 400.023 of the Florida statutes establishes that the nursing home residents' rights, and by extension, the cause of action, is ***cumulative*** and does not displace older Common Law causes of action.

Oklahoma courts have held the same: The Oklahoma Supreme Court in *Morgan v. Galilean Health Enterprises, Inc.*, 977 P2d 357, 361 (Okla. 1998) (emphasis added), made plain that Oklahoma's residents' rights statute created a "'statutory tort,' *i.e.* a legislatively-crafted, non-contractual duty, ***unknown to the common law***, for the breach of which an action *ex delicto* will lie."). If Kentucky follows the precedent of her sister States in this regard, KRS § 216.515 sets forth a cause of action separate from anything at Common Law, and the Statute of Limitations provided by KRS § 413.120 applies. The Court of Appeals opinion in this case did not address whether the General Assembly

intended for Kentucky to be unique in the nature of its residents' rights statutory scheme.

For all the reasons argued in this section, this Court should reverse the Court of Appeals, as noted.

III. Appellant has made out a statutory cause of action under KRS § 216.515.

The nature of Appellant's claim should be that which is ascertainable from the black letter of the Complaint. Any claim which is past the Statute of Limitations can be dismissed out. However, Appellant's Complaint substantively alleges violations of his mother's residents' rights, and this claim, which is within the Statute of Limitations, must be kept.

Appellees argued in the lower court that Appellant's cause-of-action is in its factual premises a negligence or malpractice claim, even though styled as a violation of the Residents' Rights Statute. (Appellees' Court of Appeals Brief, dtd. Aug. 3, 2012, at p. 11) And the Court of Appeals opined that "Mrs. Gordon... could have asserted a common law action to recover damages for negligent or other improper residential care, personal injury and/or death without implicating the provisions of KRS Chapter 216.... The estate's appellate counsel candidly acknowledged this at oral argument." (*Overstreet Opinion* at pp. 8-9)

Unfortunately the Court of Appeals' observation misses the point. First, the fact that a Common Law action could have been pled in that case hardly means that this would be true in every case. As such, this was not a suitable fact upon which to predicate a facial rule regarding the Statute of Limitations applicable to KRS § 216.515 generally. (*See argument supra*) Second, and what perhaps should be obvious, the fact that certain negligence torts routinely ***accompany*** the factual predicate for a violation of a statutory

cause-of-action does not mean or imply that these causes of action are only different theories of liability going to one and the same tort.

Appellant's Complaint sets out a complete statutory rights claim, and this is all that is required from the outset of an action.[5] *See Natural Resources and Envoironmental Protection Cabinet v. Williams*, 768 SW2d 47, 51 (Ky. 1989) (motions to dismiss exist to challenge insufficient claims while motions for more definite statement exist to challenge vague or ambiguous claims). Kentucky is a notice pleading jurisdiction. *See Pierson Trapp Co. v. Peak*, 340 SW2d 456, 460 (Ky. 1960) ("It is immaterial whether the complaint stated 'conclusions' or 'facts' as long as fair notice is given.") (*citing* Moore's Federal Practice, Vol. 2, p. 1647). Appellant need only plead his claims, grounded in KRS § 216.515, and this he has done. Nothing else in his causal pleadings need be regarded. *See Hughes v. Ramey*, 203 SW2d 63, 66 (Ky. 1947) (in a cause of action for failure to conform to an election statute, pleading facts underlying the material fact of non-conformance deemed surplusage and could be disregarded). ***To the extent that Appellant has pled irrelevant allegations/facts in his cause of action, Appellees' proper course should have been to move to strike those facts***, *see City of Ludlow v. Union Light, Heat & Power Co.*, 186 SW2d 640, 641 (Ky. 1945) (when equity amongst rates charged in different cities was not part of the contract, city pleading rates charged in other cities for claim that gas company overcharged residents deemed irrelevant and struck), or to move for a more definite statement, not contort Appellant's facts into a different cause-of-action to which Appellees could artificially interpose the wrong Statute of Limitations.

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[5] Appellees at trial would obviously have the option of moving *in limine* to exclude irrelevant evidence and asking for limiting instructions for relevant evidence that might be used for impermissible purpose by a jury.

On the other hand, to the extent Appellees seek to predict Appellant's proof at trial, contending that Appellant can only make out a cause of action barred by the Statute of Limitations, or that Appellant's residents' violations cannot support anything other than a *de minimis* claim; this reasoning should not be permitted to support a dismissal. *See Mims v. Western-Southern Agency, Inc.*, 226 SW2d 833 (Ky.App. 2007). In *Mims* an insurance policy beneficiary sued a life insurance company, claiming that the policy holder intended that the beneficiary be made the sole contingent beneficiary, but that the company had negligently failed to effectuate the holder's intentions. The company argued that there was no way to prove the policy holder's intentions without the use of hearsay, and the lower court agreed, dismissing the complaint. The Court of Appeals, in an undisturbed opinion, vacated the trial court's order, calling the dismissal ***premature***. *Id.* at 836.

Appellees essentially argued below both specifically and holistically. Specifically, Appellees argued that Appellant's pleadings included facts which did not properly go to the statutory violations, but were facts going to personal injury, wrongful death, or medical malpractice. "Ms Gordon suffered 'pressure sores, urinary tract infections, upper respiratory infections, falls, bruising, skin tears, fracture, weight loss, dehydration, subdural hematoma, and death.'" (Appellees' Court of Appeals Brief, dtd. Aug. 3, 2012, at p. 10)

So?

If these facts are wholly irrelevant and may not be pled up to demonstrate a violation of residents' rights, *see e.g.*, KRS §§ 216.515(6), 216.515(18); then they could be dealt with before trial through the classic motion *in limine*, or even from the outset

through a motion to strike. Such a specific verbiage argument is entirely misplaced in a motion to dismiss because violation of residents' rights is a cause of action ***standing on its own***, and ***has been pled.*** Any problems in the pleadings could be corrected by something short of dismissal. *See Natural Resources and Envoironmental Protection Cabinet v. Williams*, *supra.*

Nonetheless, Appellees have also argued holistically regarding Appellant's Complaint. That is, Appellees argue that, taken as a whole, Appellant's Complaint smacks of a personal injury action, and an independent residents' rights cause-of-action should not be seen to exist here. However, this argument boils down to calling the cause-of-action created via KRS § 216.515 a "gap-filler." In the case of *Banks v. Fritsch*, 39 SW3d 474 (Ky.App. 2001), another Court of Appeals case, that court held that the Common Law tort of Outrage—recognized and stood up at law (Common Law) by this Court in *Rice v. Craft*, 671 SW2d 247 (Ky. 1984)—was a "gap-filler." It would not be seen to exist where a traditional Common Law tort occupied the field. According to the Court of Appeals, gap-filler torts only appear where bad behavior and harm exist within the general penumbra of recognized Common Law torts, but do not completely make out any one of the Common Law causes-of-action. Thus, according to *Banks v. Fritsch*, where the facts constituting the novel tort Outrage might also constitute some other Common Law tort, then the tort of Outrage did not actually lie; the other Common Law tort would subsume Outrage and presumably bring along with it the Statute of Limitations associated with the more traditional tort.

KRS § 216.515 is not a gap-filler. KRS § 216.515—obviously a legislative act and not a tort implied into existence at Common Law by the courts—shows no sign of

being intended as a gap-filler by the General Assembly. More importantly, there is absolutely no precedent whatsoever for holding any General Assembly statute to be a mere gap-filler.

Furthermore, the gap-filler doctrine exists solely in the realm of intentional torts. For a gap-filler tort to have life, the test asks whether the tortfeasor ***intended*** only the gap-filler effect. *See Banks v. Fritsch*, 39 SW3d at 481 ("Banks must show that Fritsch's actions were intended only to cause him extreme emotional distress, rather than to merely touch or to deprive him of his liberty."). Because the facts in *Banks* would support a finding that the tortfeasor intended assault and battery and wrongful imprisonment to the same extent that they would support the tort of Outrage, the latter claim would be dismissed as a superfluous gap-filler. Here, it would make no sense to ask whether Appellees intended only to deprive Appellant's mother of her rights as a long term care facility resident. This is a case of deprivation of statutory rights engendered by the General Assembly, not a case of an overflow tort for bad behaviour for which the Common Law makes a belated provision through a Common Law gap-filler.

The KRS § 216.515-KRS § 413.120 relationship is fully applicable and intact. The test here should be, at the outset, to ask whether Appellant has pled the necessary elements to make out the statutory violations; and later, to ask whether at the end of trial Appellant has produced facts proving up these statutory violations.

For all the reasons argued in this section, this Court should reverse the Court of Appeals, as noted, with directions.

IV. KRS § 216.515 liability extends to more than just long term care facility license holders.

Because the Court of Appeals ruled that the Statute of Limitations made the issue moot, the Court of Appeals did not rule on Appellant's cross-appeal below, of whether liability under KRS § 216.515 may attach to persons or entities other than just the facility license-holder. Nonetheless this Court should rule upon the question, as this is a ripe question solely of law.

KRS § 216.515 provides a series of statutorily-created rights in twenty-five subsections, and right of court enforcement in the twenty-sixth subsection. The statute in no way evinces an intention by the General Assembly to shield parties from liability that they would have had at Common Law or otherwise. KRS § 216.515 specifies that a facility may be held liable for a violation of the resident's rights. The trial court here erred in holding that the wording of KRS § 216.515 precludes liability for any other party for a resident rights' violation under any of the myriad theories that might be developed by the facts in the litigation.

KRS § 216.515(26) (emphasis added) provides that "[a]ny resident whose rights as specified in this section are deprived or infringed upon shall have a cause of action against any facility ***responsible*** for the violation." The corporate appellees in this action were all involved in the operation, management and control of the Center such that liability may be assessed against them directly, or via theories of joint venture, alter ego, vicarious liability, etc.... Those are the allegations in Appellant's Complaint. Those allegations must be taken as true at this juncture in the litigation. *Berthelsen v. Kane*, 759 S.W.2d at 832.

A plethora of theories exist to attach liability to the subject corporations then, both direct and vicarious. Simply put, Appellant alleges that his mother's rights were violated,

and that the Appellees here were responsible for these violations. The corporate appellees advanced the position that regardless of any theory of direct liability, vicarious liability, or other theory, *e.g.*, piercing of a corporate veil, their restrictive definition of the word "facility" acts as an absolute bar to holding them accountable. Such an interpretation is untenable and cannot be reconciled with the obvious purpose of KRS § 216.515 of upholding residents' rights.

According to the Complaint, Appellees were all involved in the operation, management and control of the Center and that liability could be assessed against the corporate appellees via theories of vicarious liability, joint venture, alter ego, etc.... They cannot escape liability by limiting the effect of the remedial statutory language. Indeed, any person or entity can be vicariously liable for the malfeasance of another under certain circumstances. Restatement 2d Agency § 213 provides:

> A person conducting an activity through servants or other agents is subject to liability for harm resulting from his conduct if he is negligent or reckless:
>
> (a) in giving improper or ambiguous orders of in failing to make proper regulations; or
>
> (b) in the employment of improper persons or instrumentalities in work involving risk of harm to others:
>
> (c) in the supervision of the activity; or
>
> (d) in permitting, or failing to prevent, negligent or other tortious conduct by persons, whether or not his servants or agents, upon premises or with instrumentalities under his control.

The corporate appellees may be held directly liable for their actions and inactions directly leading to the violation of Mrs. Gordon's rights. *See Boggs v. Blue Diamond Coal Co.*, 590 F2d 655, 663 (6th Cir. 1979) (parent corporation could be liable for

independent acts causing harm to subsidiary's employees). There is simply no defense theory that the corporate appellees may avoid their culpability in this action by simply pointing to the word "facility" in the statute. And if Appellant can produce facts demonstrating that the corporate appellees were ultimately directly responsible for the Center's malfeasance in violating Mrs. Gordon's rights, there is no reason why KRS § 216.515 somehow should act to shield the corporate appellees from liability.

Additionally, under the theory of alter ego, the corporate appellees would themselves be considered "the facility" for purposes of this case, and KRS § 216.515 would apply to them to the same extent as the "bricks and mortar" on site. Alter ego exists when the existence of a distinct entity is in reality a legal fiction serving only to ward off responsibility. Such a legal fiction will be disregarded to find actual culprits for wrongs. *C.L.&L. Motor Express Co. v. Achenbach*, 82 SW2d at 339 (distinct entities will be ignored where they exist for purpose of avoiding the rights enshrined in law). This can be a question of fact for a jury. *See May v. Sullivan*, 188 SW2d 469, 470 (Ky. 1945) (Issue of whether a corporation was mere alter ego of its president and was used as shield to perpetrate fraud on defendant, was for the jury.). Furthermore, "piercing the corporate veil"—an equitable theory premised again upon facts—exists to find actual culprits for wrongs, to disregard the legal fiction of a distinct entity when such exist merely to shield against responsibility. *C.L.&L. Motor Express Co. v. Achenbach*, 82 SW2d 335, 339 (Ky. 1935). Appellees offered neither argument nor citation in support of a proposition that such liability could not attach to the corporate appellees from violation of Kentucky's Residents' Rights' Statutes.

"Piercing the corporate veil" is at least a mixed question of law and fact, logically requiring discovery going to the latter. *See Schultz v. General Electric Healthcare Financial Services, Inc.*, 360 SW3d 171, 178 (Ky. 2012) (issue of whether corporate veil could be pierced as a mere instrumentality of the sole shareholder could not be resolved on the pleadings in absence of material facts pled and not controverted). Judgment, even if in equity, *i.e.*, a decision from the bench sitting in chancery, "is only proper after a party has been given ample opportunity to complete discovery[.]" *Pendleton Brothers Vending, Inc. v. Commonwealth Finance and Administration Cabinet,* 758 S.W.2d 24, 29 (Ky.1988).

Likewise, the question of whether a joint enterprise exists is a question of fact for a jury. *C.f. Helton v. Montgomery*, 595 S.W.2d 257, 258 (Ky. App. 1980) (requiring some evidence to be offered supporting the existence of a joint venture prior to submitting the question to the jury): *see also Akers v. Stamper*, 410 S.W.2d 710 (Ky. App. 1966) (where the Court accepted without comment that the question of joint venture would be one for the jury absent equitable considerations). ***The Circuit Court cut short all these theories by dismissing the case prior to discovery.*** That court's order held in effect that, as a matter of law, no evidence whatsoever could cause liability to lie with the corporate appellees under KRS § 216.515. There is neither precedent nor logic to support this.

KRS § 216.515 self-evidently exists for the purpose of engendering and enforcing a new set of statutory rights. It was not created to limit the avenues of redress for those rights or to limit Common Law theories (conduits) of liability. The *raison d'etre* for KRS § 216.515 is that the nursing home resident's vulnerability to, and relationship with, his

care providers, is unique. (*See argument supra*) KRS § 216.515 exists to stand up relational rights, between care providers and resident, to recognize a new kind of statutory fiduciary. ***Any entity*** that steps into that unique relationship however is properly the object of KRS § 216.515's mandates and enforcement mechanisms. Indeed, where appropriate, a parent entity may be held vicariously liable for breach of a subsidiary's fiduciary duty, *see Radol v. Thomas*, 772 F2d 244, 258-259 (6th Cir. 1985) (personal fiduciary duty of brokers attributable to brokerage house), even apart from any theories of direct liability. There is no reason not to recognize such a conduit of liability in this instance.

The corporate appellees have limited the interpretation of the residents' rights statute to some type of literal interpretation, despite having no justification for doing so, and the trial court blessed this limitation. Yet another literal interpretation of "facility" or "nursing home" would be the nonsensical one of referring to a building, but of course a building cannot be held responsible for anything at Law. This would be an absurdity, as would be a preclusion of liability for the corporate appellees as a matter of law.

KRS § 216.515 states (emphasis added): "Any resident whose rights as specified in this section are deprived or infringed upon shall have a cause of action against any facility ***responsible*** for the violation." The word "responsible," and the concept of responsibility, appear to be a seminal point in this sentence in the statute. A more rational interpretation of the word "facility," borrowed from U.S. federal law upholding statutorily-created rights, is that of the "integrated enterprise test" *See Sandoval v. American Bldg. Maintenance Industries, Inc.*, 578 F3d 787, 793-794 (8th Cir. 2009) ("integrated enterprise test" created by U.S. Congress to test for corporate liability in

discrimination cases). In such an instance where the defendant facility is merely one "franchise" in a holistic nursing home business, "facility" for purposes of KRS § 216.515 refers to the whole business, including the corporate appellees.

Appellees argued below that, even if the corporate appellees had complete and unfettered control over the conditions at the Center; this notwithstanding, liability could not attach to them as a matter of law. According to this theory, even if the name listed on the licensee application were a hollow or even sham entity, and the care interaction between the Center and residents were totally in the hands of persons or entities not listed as licensee, none of this would matter. That would render the applied meaning of the statute ***absurd***.

Appellees have taken the position that they were merely relying upon the black letter of the statute, and that Mr. Overstreet is seeking to expand the law by employing creative statutory interpretation. This is a misconstruction of positions. It was not Mr. Overstreet who was seeking to expand the law. He was seeking only the normal operation of principles of law in Kentucky which apply to statutory as well as Common Law rights of action. It was Appellees that were effectively seeking a change in the law, to restrict liability with respect to KRS § 216.515, but offering no basis in either law or public policy for doing so.

In his Complaint Mr. Overstreet alleged that:

> Nursing Home Defendants controlled the operation, planning, management, budget and quality control of Harrodsburg Health Care Center. The authority exercised by Defendants over the nursing facility included, but was not limited to, control of marketing, human resources management, training, staffing, creation and implementation of all policy and procedure manuals used by nursing facilities in Kentucky, federal and state reimbursement, quality care assessment and compliance, licensure

> and certification, legal services, and financial, tax and accounting control through fiscal policies established by Defendants.

(RA at p. 7) His position is that if the facts alleged here are proven, Appellees should all be held liable for violations of Mrs. Gordon's statutory rights under the Residents' Rights Act. Appellees below cited a number of cases that have restricted liability on statutory duties. (*See* Appellees' Court of Appeals Brief, dtd. Oct. 2, 2012, at pp. 15-16) However perusal of these cases (*discussed infra*) establishes their distinguishability, and demonstrates that they turned entirely upon questions of definition which were in turn answered by interpreting the statutory intent unique to the statutes in question. Additionally these cases did not address the applicability of vicarious liability at all.

In *Emerson v. Thiel College*, 296 F3d 184 (3rd Cir. 2002), the U.S. Court of Appeals determined that when the Americans with Disabilities Act ("ADA") prohibited "any person who owns, leases (or leases to), or operates a place of public accommodation" from discriminating against disabled persons, Congress did not intend for college presidents and vice-presidents for academic affairs to be considered operators for purposes of the ADA. That is, while a strict definition might include them, the Court would read in a statutory intent to remove them from liability. Likewise, in *White v. Creighton University*, 2006 WL 3419782 (D.Neb.), the plaintiff sued the teachers and administrators of a college operated by the Jesuits (Society of Jesus) for ADA discrimination, but the District Court declined to allow direct liability to reach so far. For direct liability purposes,[6] these courts would accept the narrower definition of "operator," given the statutory intent.

[6] The issue of any vicarious liability does not appear in either opinion, as there was no question that college officials were masters over an "agent" university.

That was the judicial interpretation of the intent of the ADA. Here, the clear and announced intent of the General Assembly is to hold liable those "responsible" for violations of residents' rights.

But it is ***not just*** that those responsible for the violations of KRS § 216.515 should be subject to liability therefore. It is that the holistic business establishment of modular construction called Kindred ***is*** the "facility," is "establishment[] with permanent facilities including inpatient beds." *See* KRS § 216.510(1). In the case at bar, it is Mr. Overstreet's contention that the corporate appellees had the power over the treatment of the residents at the Center, that they both owned and controlled the Center as masters (vicarious liability), and that they ***are*** in effect "the Facility" (direct liability).

Additionally, the burden was upon the corporate appellees to demonstrate that the normal operation of Common Law principles of vicarious liability have been suspended by the statute in question. The principles of Common Law could, if proven appropriately, extend vicarious liability to all the appellees, making this a question one of fact. Mr. Overstreet's appeal relies upon the black letter of the statute and the normal operation of principles of law in Kentucky.

To reference another jurisdiction, in an instance more analogous to the case at bar, in the case of *Lee v. Detroit Medical Center*, 775 N.W.2d 326 (Mich.App. 2009), a Michigan court was faced with a cause of action based upon a statutory duty The plaintiff sued a physician and hospital for a breach of a duty requiring physicians to report child abuse. The hospital demurred at being included as a potential tortfeasor in the action, because it was a statutory tort and the statute's language was clear as to

obligor. The Michigan court held that the hospital could in fact be included because the Common Law theories of liability still applied.

> Defendants argue that the plain language of MCL 722.633 limits liability to individual liability only. However, a well-settled common-law principle, such as the doctrine of vicarious liability, cannot be abolished by implication. And there is no language in the statute that expressly abolishes the doctrine.

Id. at 66.

For all the reasons argued in this section, this Court should remand this case below with directions that KRS § 216.515 does present avenues for liability to be assessed against non-facility defendants.

V. Appellant offers pre-emptive rebuttal.

Appellees have made other arguments below that might hypothetically be used to affirm the Court of Appeals Opinion, even though not relied upon by that court; and thus it is advisable for Appellant to pre-emptively address them. "[I]t is well-settled that an appellate court may affirm a lower court for any reason supported by the record." *McCloud v. Commonwealth*, 286 S.W.3d 780, 786 n. 19 (Ky.2009). Fortunately for Appellant, these threats will remain only in the hypothetical, as these other arguments lack any merit whatsoever.

In the Court of Appeals, as in the Circuit Court, Appellees challenged Appellant's standing under KRS § 216.515 to bring the trial court action. By challenging standing, Appellees essentially argued that KRS § 216.515 claims are extinguished upon the death of the long term care facility resident. Yet, KRS § 411.140 (Survival Statute) provides:

> No right of action for personal injury or for injury to real or personal property shall cease or die with the person injuring or injured, except actions for slander, libel, criminal conversation, and so much of the action for malicious prosecution as is intended to

> recover for the personal injury. For any other injury an action may be brought or revived by the personal representative, or against the personal representative, heir or devisee, in the same manner as causes of action founded on contract.

KRS § 411.140 is a generally inclusive statute (providing for survival of actions) with specific exclusions, not a statute of enumerated inclusions and otherwise general exclusion. Appellant did not file an action for "slander, libel, criminal conversation... [or] for malicious prosecution." So Appellant's action certainly survived.

It also beggars belief to conclude that the General Assembly wrote a statute to protect nursing home residents, but allowed such protections to practically evaporate upon a facility killing its resident. If the General Assembly had intended a Residents' Rights action to die with the resident, presumably the General Assembly would have so indicated. And if the claim survives, it must be prosecutable by someone. That someone would naturally be the personal representative of the deceased resident's estate.

In the Court of Appeals, as in the Circuit Court, Appellees invoked the Doctrine of *Laches* against Appellant. Unfortunately for Appellees, they did not put forth any fact in the trial court which might support the doctrine's application. A party asserting *laches* must produce facts of detrimental reliance upon a plaintiff's inactivity. Here, Appellees produced none.

> Laches is an equitable doctrine, the elements of which are short of an estoppel, and the time in which it may ripen is short of the applicable period of limitation, and it is invoked in equity to defeat a tardy litigant on account of whose inexcusable delay, after possession of knowledge of the facts, his adversary, ***who has materially changed his situation***, may defeat a recovery or defense because of the other's passiveness, if during the delay, and ***in reliance*** on such nonaction, a change has occurred in the situation and condition of the adversary to such an extent that to uphold the action and to grant the relief would put it beyond the power of the

> adversary to restore himself to his former situation or the court to place him in statu quo.

Klineline v. Head, 266 SW 370, 372 (Ky. 1924) (emphasis added). There is no precedent for Appellees to rely merely upon the passage of time for the doctrine.

Appellees have no meritorious argument to support the lower court's Opinion. For all the reasons argued in this brief, this Court should remand this case below with directions.

CONCLUSION

Based upon the foregoing, Appellant prays this Court reverse the Court of Appeals and remand this case with directions. Appellant believes that oral argument is necessary in this appeal.

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